A **BASKARAN GOVINDASAMY & ORS v. CHIEW YIT KIN**

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
COLLIN LAWRENCE SEQUERAH JCA
AHMAD KAMAL MD SHAHID JCA
B [CIVIL APPEAL NO: W-01(NCVC)(W)-222-04-2023]
10 APRIL 2025

Abstract – *In order to preserve the title of a property, the end purchaser must prove that he is a purchaser in good faith for valuable consideration. While the word 'good faith' has no exhaustive meaning, it is generally understood to mean honesty or sincerity of intention. Any elements of fraud, deceit, dishonesty, carelessness, negligence and knowledge of a dispute as to the ownership in the transaction would vitiate good faith that would render the transaction invalid and the title as defeasible.*

LAND LAW: *Transfer – Validity of – Proprietor alleged to have transferred land to third party who sold land to final purchaser – Whether bona fide purchasers for valuable consideration – Whether final purchaser acted in good faith – Whether payment of unusually high earnest deposit even before land search done showed transactions were sham – Whether absence of proper trail of payment highly irregular – Whether proof for payments of assessment rates and quit rent provided – Whether payment of valuable consideration proved*

The plaintiff was the sole proprietor of the subject land. The original issue document of title for the subject land ('genuine IDT') had always been and remained with the plaintiff and the plaintiff never surrendered and/or parted with and/or disposed of the genuine IDT in any manner whatsoever to any third party whosoever. The plaintiff's nightmare began when she came to know that the subject land was sold and/or transferred to a new owner. A land search on the subject land and further investigation by the plaintiff revealed that the third defendant, the first transferee, had entered a private caveat on the subject land. The plaintiff had purportedly transferred the subject land to the third defendant ('fraudulent transfer') and executed a Form 14A for transfer of the subject land in consideration for RM4,300,000 ('fraudulent Form 14A') by purportedly signing the said document ('forged signature'). The sixth defendant, a solicitor, had purportedly witnessed and attested the plaintiff's consent and the forged signature on the fraudulent Form 14A. The fourth and fifth defendants executed the fraudulent Form 14A as directors of the third defendant to purportedly receive the transfer of the subject land in the third defendant's name. Upon presentation of the fraudulent Form 14A, the subject land was registered in the third defendant's name, after which, it was transferred to the seventh and eighth defendants as

joint purchasers. The ninth defendant subsequently entered a lien-holder's caveat on the subject land. After the transfer of the subject land to the seventh and eighth defendants, the fourth and fifth defendants resigned from the third defendant, and the third defendant was dissolved and its name was struck off from the Register of Companies. The title of the subject land remained in the seventh and eighth defendants' names. The plaintiff contended that at all material times, she had never consented to the fraudulent transfer to the third defendant or any other party, nor had she ever received any consideration from the third defendant for the fraudulent transfer. The plaintiff further contended that the third defendant, as a RM2 shell company with zero current assets and negative cash balance, simply had no means to pay any consideration to purchase the subject land from the plaintiff. Upon discovery of the fraudulent transfer, the plaintiff lodged a police report and filed the present civil suit in the High Court. The High Court decided in favour of the plaintiff. The present appeal was by the seventh, eighth and ninth defendants.

Held (dismissing appeal with costs; affirming decision of High Court)
Per Ahmad Kamal Md Shahid JCA delivering the judgment of the court:

(1) Based on the decision in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*, the Judicial Commissioner had erred in law and facts in holding that the seventh and eighth defendants were immediate purchasers of the subject land and not subsequent purchasers. Further, the seventh and eighth defendants failed to discharge the evidential burden on them to show that they had acted in good faith. They had not proven the assertion that the purchase of the subject land was made in good faith having failed to produce the private land search purportedly conducted on the subject land before entering into the SPA. (paras 23, 28 & 30-32)

(2) The alleged payment of RM2 million in cash, which constituted 44.4% of the purported purchase price, even before, of sale and purchase agreement ('SPA') the execution was highly unusual. The normal earnest deposit paid by a buyer is 2% to 3% of the purchase price. It was even more unusual as the sum was paid even before the purported seller, the third defendant, agreed to the terms of the SPA and signed the SPA, before the searches were done, signifying that the third defendant was bound by the terms therein. There were also contradictions pertaining to the cash payment by the seventh defendant, the five cash/payment vouchers, and the letters from the sixth defendant, purportedly acknowledging receipt of the five cash payments. The absence of proper trail for the payment of large amounts of cash were highly irregular and showed that these were clearly fabricated evidence and pointed towards a sham SPA. (paras 33-36 & 45-49)

(3) There was failure by the seventh and eighth defendants to provide any documentary proof for the payments of assessment rates and quit rent. On the other hand, the plaintiff was able to show that Dewan Bandaraya

Kuala Lumpur ('DBKL') bills were addressed to her address and produced receipts to prove that she had been paying the yearly assessment and quit rent. This continued even up to the year 2021 until the fraudulent transfer was discovered. The failure to complete the transfer of names with DBKL and not paying assessment rates and quit rent were apparent indicators that the seventh and eighth defendants were not *bona fide* purchasers. (paras 40-42)

(4) Neither the property agent nor the sixth defendant was called as witnesses and, hence, the absence of witnesses who could testify as to the authenticity of the five cash/payment vouchers allegedly issued by the ninth defendant and the five letters from the sixth defendant purportedly acknowledging receipt of the five cash payments. There was no reasonable explanation for the failure to produce the two material witnesses. This attracted adverse inference against the seventh and eighth defendants. In this light, the seventh defendant had not proven that he had paid RM2 million in cash to the real estate agent, who paid the sixth defendant who then paid her alleged client/the alleged seller, the third defendant. The seventh and eighth defendants had failed to prove that they provided valuable consideration of RM4.5 million for the purported purchase of the subject land. (paras 50-52)

(5) The ninth defendant had not shown that it was entitled to lodge a lien-holder's caveat on the subject land as against the plaintiff. The plaintiff was therefore entitled to an order to remove the ninth defendant's lien-holder's caveat on the subject land. (para 54)

Case(s) referred to:
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(dist)***
Bitara Angkasa Sdn Bhd v. Cheok Lam Chuan & Ors [2024] 1 CLJ 202 CA ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(dist)***
Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***
Malayan Banking Bhd v. Mohd Affandi Ahmad & Anor [2024] 10 CLJ 501 FC ***(refd)***
T Sivam Tharamalingam v. Public Bank Bhd [2018] 6 CLJ 1 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Wong Ing Tong v. Yap Piat Eng & Anor And Other Appeals [2022] 4 CLJ 882 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114
National Land Code, ss. 324(3), 340(3)

For the appellant - R Ramanthan, S Selvarajah, James Lopez & Joseph Tan; M/s Fernandez & Selvarajah
For the respondent - Marcus Lee Min Lun & Emily Wong; M/s Marcus Lee

[Editor's note: For the High Court judgment, please see Chiew Yit Kin v. Pengarah Tanah Dan Galian Wilayah Persekutuan & Ors [2024] CLJU 555 (affirmed).]

Reported by S Barathi

JUDGMENT

Ahmad Kamal Md Shahid JCA:

Introduction

[1] This is an appeal by Baskaran a/l Govindasamy (seventh defendant), Ramola a/p P Janardanan (eighth defendant) and Bright Way Holdings Sdn Bhd (the ninth defendant) against the decision of the High Court dated 30 March 2023 which was made in favour of Chiew Yit Kin (the plaintiff) in relation to a purported fraudulent land transfer.

[2] The plaintiff alleged that her vacant land in Damansara Heights (subject land) was transferred to Beyond Opulence Sdn Bhd (the third defendant) and then to the seventh and eighth defendants by fraud.

[3] The plaintiff instituted an action against:

(i) Pengarah Tanah dan Galian Wilayah Persekutuan (the first defendant/land office) for negligence;

(ii) Kerajaan Malaysia (the second defendant/Government of Malaysia) for vicarious liability;

(iii) the third defendant who was the first transferee of the subject land;

(iv) Norhasmizi bin Napi (fourth defendant) and Wan Muhamad Irywan bin Wan Mohamad Sahini (fifth defendant) who were directors of the third defendant for fraud;

(v) Wan Zaiharatulhasra binti Hamid (the sixth defendant/lawyer) who falsely and purportedly attested the plaintiff's execution of the transfer Form 14A in favour of the third defendant;

(vi) the seventh to eighth defendants/buyers of the subject land for fraud and forgery and obtaining title through a void instrument; and

(vii) the ninth defendant who had entered a lien holder's caveat on the subject land.

[4] We have carefully examined the records of appeal, and considered the submissions by both parties including the latest supplementary submissions filed by both parties on 17 February 2025 upon request of the seventh to ninth defendants *ie*, the appellants in the present appeal, following the latest decision by the Federal Court in *Malayan Banking Bhd v. Mohd Affandi Ahmad & Anor* [2024] 10 CLJ 501; [2024] 6 MLJ 220; [2025] 1 MLRA 429; (*Maybank*'s case). We thank counsel for their comprehensive written submissions and their oral clarification on the issues which were ventilated before this court.

A **Background Facts**

[5] The plaintiff was the sole proprietor of the subject land. The original issue document of title (IDT) for the subject land (genuine IDT) had always been and remained with the plaintiff. At all material times, the plaintiff never surrendered and/or parted with and/or disposed of the genuine IDT in any
B manner whatsoever to any third party whosoever.

[6] The nightmare of the plaintiff began when she was informed by her gardener that the subject land was sold and/or transferred to a new owner. A land search on the subject land and further investigation by the plaintiff
C revealed that:

(i) the third defendant entered a private caveat on the subject land through a Form 19B executed by the fourth and fifth defendants, purportedly because the third defendant had made a part payment of the purchase price to purchase the subject land from the plaintiff as the seller;

D (ii) the plaintiff had purportedly transferred the subject land to the third defendant, and the title purportedly registered in the third defendant's name (fraudulent transfer);

(iii) the plaintiff had purportedly executed a Form 14A as an instrument for transfer of the subject land in consideration for RM4,300,000 (fraudulent Form 14A) by purportedly signing the said document
E (forged signature);

(iv) the sixth defendant had purportedly witnessed and attested to the plaintiff's consent and the forged signature on the fraudulent
F Form 14A;

(v) the fourth and fifth defendants had executed the fraudulent Form 14A as directors of the third defendant to purportedly receive the transfer of the subject land in the third defendant's name;

G (vi) the first defendant registered the title of the subject land in the third defendant's name upon the presentation of the fraudulent Form 14A by the latter;

(vii) thereafter, the fourth and fifth defendants executed the Form 14A as an instrument for transfer of the subject land to the seventh and eighth
H defendants as joint purchasers;

(viii) about 74 days after the fraudulent transfer, the third defendant transferred the subject land to the seventh and eighth defendants as joint purchasers;

I (ix) the ninth defendant subsequently entered a lien-holder's caveat on the subject land; and

(x) after the transfer of the subject land to the seventh and eighth defendants, the fourth and fifth defendants resigned from the third defendant. The third defendant was subsequently dissolved and its name was struck off from the Register of Companies. The title of the subject land remained in the seventh and eighth defendants' names.

[7] At all material times, the plaintiff had never consented to the fraudulent transfer to the third defendant or any other party. Nor had she ever received any consideration from the third defendant for the fraudulent transfer.

[8] The plaintiff further contended that the third defendant, as a RM2 shell company with zero current assets and a negative cash balance, simply had no means to pay any consideration to purchase the subject land from the plaintiff,

[9] Upon discovery of the fraudulent transfer, the plaintiff lodged a police report with the Royal Malaysian Police and filed the present civil suit in the High Court.

In The High Court

[10] Based on the amended statement of claim, the plaintiff contended, among others, that:

(i) the third to fifth defendants have acted in concert and/or with the common intention to perpetrate the fraudulent transfer. As a result of the fraudulent transfer, the plaintiff suffered loss and damage, including the loss of her proprietorship as a legal and beneficial owner over the subject land;

(ii) the sixth defendant has made and/or caused to be made a false declaration and/or fraudulent representation to the first defendant that she has witnessed and attested to the plaintiffs execution of the fraudulent Form 14A by inscribing a hand-written signature on it. The sixth defendant has acted in concert and/or with the common intention together with the third to fifth defendants to perpetrate the fraudulent transfer;

(iii) the first defendant owes the plaintiff a duty to exercise reasonable care by making necessary enquiries and/or conducting a fair assessment on the presentation of the instrument for a transfer of the subject land before effecting the fraudulent transfer;

(iv) the first defendant had failed to exercise reasonable care by negligently endorsing its memorial on the documents of title to the subject land when the presentation of the fraudulent Form 14A was unaccompanied by the genuine IDT. At all material times, the genuine IDT was and has always been in the custody of the plaintiff;

(v) as a result of the first defendant's gross negligence, the plaintiff suffered loss and damage, including loss of her proprietorship as a legal and beneficial owner over the subject land;

(vi) the second defendant is vicariously liable for the negligence of the first defendant; and

(vii) the title obtained by and now registered in the seventh and eighth defendants' names as immediate purchasers is defeasible in law and that they are not *bona fide* purchasers in good faith and for valuable consideration.

[11] Therefore, in the suit, the plaintiff prayed for the following reliefs:

(i) a declaration that the plaintiff is the registered proprietor and the true legal and beneficial owner of the subject land;

(ii) a declaration that all and any of the register and issue documents of title to the subject land, endorsed and/or issued by the first defendant after the date of the genuine IDT, are not the true *indicia* of title to the subject land and are therefore null and void;

(iii) an order for all and any of the IDT to the subject land, endorsed and/or issued by the first defendant after the date of the genuine IDT, be produced and delivered by the third to fifth, seventh to ninth defendants to the first defendant to be cancelled and extinguished immediately;

(iv) an order for all the memorials endorsed by the first defendant which are appearing in the register document of title to the subject land relating to the interests of the third to fifth, seventh to ninth defendants be cancelled and extinguished immediately by the first defendant;

(v) an order for the removal of the lien-holder's caveat entered into by the ninth defendant on 20 May 2016;

(vi) an order for all the lawful documents of title and records of the first defendant be rectified to reinstate the genuine IDT and the plaintiff as the registered proprietor of the subject land with immediate effect;

(vii) an order for damages to be assessed, against the first to sixth defendants;

(viii) an order for exemplary damages to be assessed, against the first to sixth defendants;

(ix) costs on an indemnity basis; and

(x) such further and other relief that the Honourable Court deems fit in the circumstances.

[12] The third to sixth defendants did not enter appearances. The plaintiff has obtained judgments in default of defence against them on 19 September 2022. This leaves the first, second, seventh, eighth and ninth defendants to fight in the battle.

[13] Before the learned Judicial Commissioner (JC), the issues raised were:

(i) whether the title to the subject land was fraudulently transferred from the plaintiff to the third defendant without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third to sixth defendants;

(ii) whether the first and second defendants were liable to the plaintiff for negligence in failing to exercise reasonable care in registering the transfer of the title to the subject land from the plaintiff to the third defendant;

(iii) whether the seventh and eighth defendants were entitled to register and retain the title to the subject land in their personal names as *bona fide* subsequent purchasers of the subject land in good faith and for valuable consideration, if any;

(iv) whether the seventh and eighth defendants were immediate purchasers and not subsequent purchasers under the proviso to s. 340(3) of the National Land Code 1965 (NLC) as they had acquired their title not from an immediate purchaser but from imposters of those entitled to the land; and

(v) whether the plaintiff had absolutely assigned her right over the subject land to her daughter as a donee under a power of attorney and hence had no *locus standi* to file this suit.

Findings Of The Learned Judicial Commissioner

[14] The learned JC had allowed the plaintiff's claim in prayers 58.1 to 58.6 of the amended statement of claim and damages to be assessed against the first and second defendants on, among others, the following findings and grounds (the sequence of issues are as per the arrangement in the grounds of judgment of the learned JC):

(i) issue (e) - the plaintiff has *locus standi* and is competent to file this suit to recover her land despite she has absolutely assigned her right over the subject land to her daughter as a donee under a power of attorney.

(ii) issue (a) - the title to the subject land was fraudulently transferred from the plaintiff to the third defendant, without the plaintiff's knowledge and consent, through the acts of fraud and forgery by the third to fifth and/or sixth defendants, *inter alia*, on the grounds:

(a) the plaintiff never executed Form 14A for the fraudulent transfer, neither did she sign the application and related forms to change her name registered on the title to the subject land to anybody; and

A (b) the plaintiff's handwriting expert (PW1) testified in his conclusion "that there is a very high probability that the writer of the specimen signatures, the plaintiff (Madam Chiew Yit Kin), is not the author of the disputed signatures". This was not challenged by the defendants;

B (iii) issue (b) - the first defendant is liable to the plaintiff for negligence in failing to exercise reasonable care in registering the transfer of the title to the subject land from the plaintiff to the third defendant because:

(a) the plaintiff still has the genuine IDT with her.

C (b) the first defendant's sole witness, DW4, could not explain:

(1) how and why the land office had issued the computerised IDT for the subject land and allowed a change of name of the registered owner of the subject land when the genuine IDT is still with the plaintiff;

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(2) why the first defendant failed to notify the plaintiff by way of Form 19A as required under s. 324(3) of the NLC when the third defendant lodged a caveat on the subject land;

(3) how the fraudulent transfer could have happened when the E presentation was not accompanied by the genuine IDT;

(4) for the failure to produce Encik Zaini who handled the application to change the name and who is still serving at Pejabat Pusaka Kecil, Seremban as well as Puan Nor Laili binti Safiin who handled the application to lodge a caveat by the third F defendant and who allowed the fraudulent transfer. Thus, an adverse inference under s. 114 illustration (g) of the Evidence Act 1950 was drawn against the first defendant that if they were to testify, their evidence would affect the first defendant adversely.

G (c) therefore, the second defendant is vicariously liable for the said negligence of the first defendant.

(iv) issue (d) - the seventh and eighth defendants are immediate purchasers and not subsequent purchasers based on:

H (a) the fact that the seventh and eighth defendants did not acquire the subject land from a purchaser who bought the land from a fraudster seller. Instead, the subject land was transferred from the third defendant to the seventh and eighth defendants in circumstances where the third defendant had obtained title fraudulently by I executing a fraudulent Form 14A which contains the plaintiff's forged signature; and

(b) guidance provided in the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768; [2014] 1 AMR 493; [2014] 2 MLRA 432 FC (*Kamarulzaman*'s case). The seventh and eighth defendants are therefore, not entitled to indefeasibility of title as against the plaintiff under the proviso to s. 340(3) of the NLC,

(v) issue (c) - the seventh and eighth defendants have failed to discharge the evidential burden on them to show they had acted 'in good faith'. The reasons provided were:

(a) the seventh and eighth defendants never produced in court the private land search purportedly conducted on the subject land on 19 August 2015 before entering into the sale and purchase agreement on 1 September 2015 (SPA);

(b) to pay 44.4 % of the purported purchase price, which is a large sum of RM2 million and also in cash, even before the seventh and eighth defendants engaged DW1 to prepare the SPA is highly unusual.

(c) the Lembaga Hasil Dalam Negeri Malaysia (LHDN) valued the market value of the subject land at RM5,269,000. The seventh and eighth defendants purchased the subject land purportedly for only RM4.5 million. That means the discount was RM769,000. This is not a small sum;

(d) the seventh and eighth defendants did not produce any written confirmation of receipt by the sixth defendant or acknowledgement by the third defendant to the effect that the RM2.5 million was indeed paid to the third defendant;

(e) the seventh and eighth defendants had failed to call their alleged real estate agent Pathisaran a/l Anthonysamy, also known as Steven, and the sixth defendant as witnesses thus invited an adverse inference under s. 114 illustration (g) of the Evidence Act 1950 that if they were to testify, their evidence would affect the seventh and eighth defendants adversely;

(f) the assessment notices did not show the third defendant is the owner of the subject land;

(g) the seventh and eighth defendants had failed to prove they had indeed paid RM4.5 million to the third defendant. Thus, they failed to discharge their evidential burden to prove they had provided valuable consideration as required under the proviso to s. 340(3) of the NLC;

(h) the plaintiff has failed to prove on a balance of probability, that the seventh and eighth defendants are privy to the fraud and forgery perpetrated by the third to sixth defendants against the plaintiff; and

A (i) the ninth defendant was not entitled to lodge a lien-holder's caveat on the subject land as the court has ruled that the plaintiff is the rightful owner of the subject land. The plaintiff is therefore entitled to an order for the removal of the ninth defendant's lien-holder's caveat on the subject land.

B **The Appeal**

[15] The present appeal is by the seventh, eighth and ninth defendants. We note that there is no appeal filed by the first and second defendants.

[16] Before us, the complaints by the seventh to ninth defendants (as per C memorandum of appeal) can be summarised as follows:

(i) the JC erred in law and fact in holding that the seventh and eighth defendants are immediate and not subsequent purchasers; and

(ii) the JC erred in law and fact in holding that the seventh and eighth D defendants are not *bona fide* purchaser for valuable consideration under the proviso to s. 340(3) of the NLC.

Our Findings

The JC Erred In Law And Fact In Holding That The Seventh And Eighth Defendants Are Immediate And Not Subsequent Purchasers.

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[17] The learned JC in coming to the finding that the seventh and eighth defendants are immediate purchasers and not subsequent purchasers had stated in paras. 115 to 118 of his grounds of judgment as follows:

> Are the seventh and eighth defendants immediate purchasers and not F subsequent purchasers?
>
> [115] The Federal Court has now clarified that a purchaser is not in law considered a subsequent purchaser under the proviso to s. 340(3) of the NLC if he has acquired his title not from an immediate purchaser but from imposters of those entitled to the land. [*Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors* [2014] 2 MLJ 768, FC Held 1, Jeffrey Tan FCJ], G
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> [116] Similarly, in this case the seventh and eighth defendants did not acquire the Subject Land from a purchaser who bought from a fraudster seller. Instead, the seventh and eighth defendants bought the Subject Land from the third defendant who had obtained title fraudulently by executing a fraudulent Form 14A which contains the plaintiff's forged H signature.
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> [117] Therefore, based on *Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Ors* [2014] 2 MLJ 768 FC, the seventh and eighth defendants are immediate purchasers and not subsequent purchasers. They are therefore not entitled to indefeasibility of title as against the plaintiff under the I proviso to s. 340(3) of the NLC.
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> [118] On this ground alone, the plaintiff is entitled to judgment against the seventh and eighth defendants.

[18] Having perused the evidence produced before this court, we are in the agreement with learned counsel for the seventh to ninth defendants that the learned JC had erred in interpreting *Kamarulzaman*'s case (*supra*). A

[19] In *Kamarulzaman*'s case (*supra*), Saribu bte Badai (the deceased) was the registered co-proprietor of a one-third undivided share in two lots of land situated in Sepang (the two lots). She died in Indonesia in 1941 without issue. Some 43 years later, the first respondent applied for and obtained an order to distribute the deceased's share in the two lots of land among himself and three others (the first to fourth respondents). B

[20] The first to fourth respondents then transferred their share in the two lots of land to the fifth and sixth respondents in consideration for the sum of RM25,000 and RM16,000 respectively. The appellants, who were the nephew and nieces of the deceased, filed a suit against the defendants whereby they sought to set aside the title to the two lots acquired by the fifth and sixth respondents. The Federal Court in this *Kamarulzaman*'s case (*supra*), in following the earlier Federal Court decision in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 1 MLRA 1; [2010] 2 MLJ 1 (*Tan Ying Hong*'s case), had held that the fifth and sixth respondents were not immediate purchasers at pp. 795-797 as follows: C D

> [4] The Chief Justice, Zaki Azmi, who delivered a supporting judgment, was in total agreement with the Chief Judge of Malaya's view 'that the error committed by the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 2 CLJ 133; [2001] 1 MLJ 241 was to read the proviso to subs. (3) as being a proviso to sub-s (2) as well'. The Chief Justice thus approached s. 340. E
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> > I would like to look at s 340 of the NLC in a more simplified manner. F
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> > *Let us refer to the first owner of a piece of land as 'A' who then, transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.*
> >
> > *As far as s 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.* G
> >
> > *Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated (see s 340(2)(a) of the NLC). Otherwise, B stands in the same position as A.* H
> >
> > The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (see s 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument. I

A The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. *Even if C is in the same position as B, sub-s (3) also does not give-protection to C unless he can show that* B *he had acquired the title or interest in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title*. If his title or interest is challenged on similar C grounds, the burden of proving there was valuable consideration and good faith lies on him.

...

[43] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* D purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of at indefeasibility. *An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from Tan* E *Ying Hong that the bona fide of an immediate purchaser is not a shield to defeasibility*. The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside. The defeasible title of a *bona fide* immediate - purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser. That the fifth and sixth respondents were *bona fide* purchasers could not by, F that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired an indefeasible title if they were *bona fide* subsequent purchasers. *But for the fifth and sixth respondents have been bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers.* G *Rather, they were imposters of those entitled to the estate of the deceased.*

They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside H *by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated.*

(emphasis added)

[21] Based on the *Kamarulzaman*'s case (*supra*), we are of the view that:

(i) the Federal Court in *Kamarulzaman*'s case (*supra*) had approved and I followed the Federal Court decision in *Tan Ying Hong*'s case (*supra*);

(ii) if we were to apply the simplified explanation by the then Chief Justice, Zaki Azmi (as he then was) in *Tan Ying Hong*'s case (*supra*) to the present case, the plaintiff would be A, the third defendant would be B and the seventh and eighth defendants would be C;

(iii) the third defendant (B) is an immediate purchaser, if his title was obtained by fraud by him or anyone else to which he was a party or privy then his claim to the title will be defeated;

(iv) the seventh and eighth defendants (C) on the other hand are subsequent purchasers. If the seventh and eighth defendants can show that they had acquired the title or interest in good faith and for valuable consideration, their title to the subject land would be indefeasible;

(v) in *Kamarulzaman*'s case (*supra*), unlike the present case, there was no immediate purchaser or purchaser (regardless of whether the immediate purchaser was a party to the fraud). The first to fourth respondents were imposters of those entitled to the estate of the deceased. They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. They had obtained title from the deceased through fraud in the distribution of the estate of the deceased and not through a fraudulent sale and purchase; and

(vi) given the above, *Kamarulzaman*'s case (*supra*) can clearly be distinguished from the present case. The learned JC had erred in applying *Kamarulzaman*'s case (*supra*) and holding that the seventh and eighth defendants are immediate purchasers of the subject land.

[22] Further, the Court of Appeal in *Bitara Angkasa Sdn Bhd v. Cheok Lam Chuan & Ors* [2024] 1 CLJ 202; [2024] 1 MLRA 577; [2024] 1 MLJ 541 which involves similar facts to the current case has held as follows:

> *Is Bitara Angkasa an immediate or a subsequent purchaser?*
>
> *[29] The learned High Court judge found that Bitara Angkasa is an immediate purchaser of the land by reason that Charles Oh has been involved in the fraud as claimed by LC Cheok because judgment in default has been entered against him; see para [21] above.*
>
> [30] According to Bitara Angkasa, it is instead a subsequent purchaser of the land and thus entitled to rely on s 340(1) and (3) of the NLC. In other words, Bitara Angkasa enjoyed deferred indefeasibility of title to the land.
>
> ...
>
> [32] The interpretation of s 340 of the NLC on indefeasibility of title vis a vis an immediate purchaser and subsequent purchaser is a question of law which has been conclusively settled in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 (FC) (overruling *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 FC) where Arifin Zakaria CJ (Malaya) (later CJ) held as follows with emphasis added by us ...

A [33] We are however mindful that the learned High Court judge found Bitara Angkasa an immediate purchaser of the land based on the following dicta of Abang Iskandar FCJ (now PCA) in *He-Con Sdn Bhd v. Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased)* and another appeal with emphasis added by us:

B > [102] The immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property that is being used as a security from a purchaser who is one that is *bona fide* for value. Any direct dealing with a rogue will necessarily vitiate the transaction rendering it
C > defeasible, although it is duly registered.
>
> ....

[37] Adopting the simplified manner of analysis of Zaki Tun Azmi CJ, we find that both the *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* case and *Tan Ying Hong v. Tan Sian San & Ors* case involved forgery
D by A. *The transferred title of B was not set aside in Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng case but the registered charge was set aside in the Tan Ying Hong v. Tan Sian San & Ors case because B was held to be an immediate chargee that could not resort to the proviso in s. 340(3) of the NLC. In respect of the CIMB Bank Bhd v. AmBank (M) Bhd & Ors, it also involved forgery by A to discharge the charge and transfer of the title to B. C, the eventual charge*
E *of the charge created by B was held to be a subsequent chargee*. As to the *He-Con Sdn Bhd v. Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased)* and another appeal, it is a case of competing interests in the land by reason of double dealings rather than strictly linear dealings between A and B and thereafter B and C that involved vitiating
F factors such as forgery or fraud.

[38] Since the *He-Con Sdn Bhd v. Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased)* and another appeal case is strictly not a case that directly concerned s 340 of the NLC, the *dicta* of Abang Iskandar FCJ (now PCA) as reproduced in para [33] above must necessarily be *obiter dicta* only.

G *[39] The relevant fact scenario here involved forgery by A but also with B in fraudulent cahoots (established by reason of the default Judgment) and thereafter transferred to C.*

[40] In this regard, it was held by Azahar Mohamed FCJ (later CJ (Malaya)) in
H *Pushpaleela a/p R Selvarajah & Anor v. Rajamani d/o Meyappa Chettiar And Other Appeals* [2019] 2 MLJ 553; [2019] 3 CLJ 441 (FC) as follows on similar facts with emphasis added by us:

> *[128] As a subsequent purchaser, the first defendant had purchased the land in good faith and for valuable consideration. The High Court found that the first defendant had at all material times neither knowledge nor notice of the*
I > *commission of the fraud by the second defendant in cahoots with the fraudster that resulted in the transfer of the land to the second defendant*. In respect of the sale of the land by the second defendant to the first

defendant, the first defendant appointed its solicitors TS Teoh & Partners. Both the first defendant and its solicitors conducted land searches on the land before the entry of the sale and purchase agreement between the first defendant and the second defendant. The searches done on 13 July 2006 and 21 July 2006 revealed that the title was clean and free from caveats including the private caveat lodged by the plaintiff's son on 1 March 2001.

[129] Applying the well-established principle to the present case, it is our considered opinion that the first defendant who conducted searches on the register and purchased the land in good faith and for valuable consideration, had, upon registration as the proprietor on the register document of title, acquired an indefeasible title, notwithstanding that the second defendant's title itself is defeasible. Hence, subsequent transfer of the land to the first defendant and the registration thereof in the name of the first defendant was indefeasible by reason that the first defendant was the bona fide purchaser for valuable consideration.

[41] By analogy, we therefore hold that Bitara Angkasa is a subsequent purchaser that acquired deferred indefeasibility to the title of the land notwithstanding that Charles Oh had committed fraud in cahoots with LC Cheok's imposter.

[42] We are further mindful that the fraud by Charles Oh here is only presumed based on the default judgment obtained by LC Cheak following the case of Kamarulzaman bin Omar & Ors v. Yakub bin Husin & Os unlike in Pushpaleela a/p R Selvarajah & Anor v. Rajamani d/o Meyappa Chettiar and other appeals where it was affirmatively proved; see Rajamani a/p Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510; [2016] 3 MLJ 660; [2015] 2 AMR 767.

[43] In the premises, we therefore find that the learned High Court Judge has plainly erred in law that justified our appellate intervention.

(emphasis added)

[23] Given the above, we are of the view that the learned JC had erred in law and facts in holding that the seventh and eighth defendants are immediate purchasers of the subject land and not subsequent purchasers.

Whether The JC Erred In Law And Fact In Holding That The Seventh And Eighth Defendants Are Not Bona Fide Purchasers For Valuable Consideration Under The Proviso To Section 340(3) Of The NLC

[24] There is a plethora of cases which had set out the law in respect of a purchaser in good faith and for valuable consideration.

[25] In *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 4 MLR A 583; [2018] 5 MLJ 711) (*T Sivam*'s case) Azahar Mohamed FCJ (as he then was) in delivering the judgment of the Federal Court had explained the scope and ambit of 'good faith' as follows:

"Good faith"

[44] The rival contentions of the parties first bring into sharp focus the meaning of 'good faith' within the context of the proviso to s. 340(3) of the NLC. As we have seen earlier, the meaning of 'good faith' is a matter of importance in this case. What does the term mean? '*Good faith* is a weighty phrase. It implies, according to *Concise Oxford English Dictionary* (11th Ed) *honesty or sincerity of intention*. According to the authors of *NS Bindra's Interpretation of Statutes* (10th Ed) p 1636 *'good faith' includes due inquiry and implies not only an upright mental attitude, and clear conscience of a person, butalso the doing of an act, showing that ordinary prudence has been exercised according to the standards of reasonable person. According to the authors, 'good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest; it must, therefore, be summed up as 'an honest determination for ascertained facts'. The authors stated that 'good faith' precludes pretence of deceit, and also negligence and recklessness. The authors further said although the phrase may vary in the context of different statutes, subjects and situations, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation.*

...

[46] in our opinion, *the existence of good faith or otherwise would depend of the particular facts of each case; it is a question of fact in each case for the court to determine on the evidence*. The overriding consideration is 'the particular circumstances of each case (see *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1997] 2 MLRA 202; [1998] 1 MLJ 465; [1998] 1 CLJ 793; [1998] 1 AMR 169 and *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 1 MLRA 116; [2005] 2 MLJ 167; [2005] 3 AMR 36)

...

[49] The second case is *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 1 MLRA 657; [2007] 5 MLJ 136; [2007] 4 CLJ 526 where in *holding that a purchaser in good faith did not include a purchaser who was careless or who had been negligent*. Raus Sharif JC (as His Lordship the was) in discussing the element of good faith explained;

Further, had the evidence adduces in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the *first defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaserwho is careless orwho had been negligent*. In *Oliver v. Hinton* [1899] Ch D 264 Lindley MR said:

> To allow purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice.

> So too here. *The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions, which ought to be taken in such a matter he is not entitled to the protection of the court*.
>
> [50] The principle underlying the above cases is that the law recognises and enforces an overriding rule that in making and carrying out conveyancing transaction that commonly deals with a number of transactions and dealing to transfer real property, parties should act in good faith. *Good faith, therefore, does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably or fairly (see Stuart v. Kinston [1923] 32 CLR 309 and Pekan Nenas Industries Sdn Bhd (supra). The elements of good faith are not closed; it must in all cases depend upon the circumstances. It is not enough for a purchaser to merely show absence of fraud, deceit or dishonesty; knowledge of a dispute as to the ownership of property and knowledge of fraud allegation, for example, could vitiate good faith*.
>
> (emphasis added)

[26] The Court of Appeal in *Wong Ing Tong v. Yap Piat Eng & Anor And Other Appeals* [2022] 4 CLJ 882; [2022] MLRAU 60; [2022] MLJU 301 held as follows:

> [54] The word "good faith" has no exhaustive meaning. Generally, good faith is understood to mean honesty or sincerity of intention. The common features to look for in determining a purchaser of good faith are as follows:
>
> (i) Good faith does not simply mean absence of fraud, deceit or dishonesty. It also requires acting honestly, reasonably and fairly; (*T Sivam a/l Tharmalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v. Public Bank Bhd* [2018] 4 MLRA 583; [2018] 5 MLJ 711; [2018] 6 CLJ 1).
>
> (ii) Knowledge of a dispute as to the ownership of property and knowledge of fraud allegation vitiate good faith; (*T Sivam*'s case).
>
> (iii) Elements of carelessness and negligence negate good faith; (*Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] MLRA 657; [2007] 5 MLJ 136; [2007] 4 CLJ 526.

[27] The issue before this court is whether the seventh and eighth defendants are purchasers in good faith such that their title prevails over the plaintiff.

[28] Having perused the evidence produced before us, we are in the agreement with the learned JC's finding that the seventh and eighth defendants have failed to discharge the evidential burden on them to show they had acted in good faith.

A *Private Land Search*

[29] During the trial, the seventh defendant testified that he had instructed his solicitors Messrs Siga & Associates to conduct a private search on the said land on 19 August 2015 and that the results of the private search confirmed that the third defendant is registered owner of the land. (See: witness
B statement DW3 question and answer: 12).

[30] However, the seventh and eighth defendants failed to produce in court the private land search purportedly conducted on the subject land on 19 August 2015 before entering into the SPA dated 1 September 2015.

C **[31]** Their solicitor, Sigathambal a/p Periathamby (DW1) who was the seventh and eighth defendants' solicitor who handled the SPA dated 1 September 2015 between the third defendant and the seventh and eighth defendants also did not produce the purported land search document.

[32] Therefore, this court is of the view that the seventh and eighth
D defendants have not proven their assertion that the purchase of the subject land was made in good faith based on the result of a private land search conducted on 19 August 2015.

RM2 Million Paid In Cash

E **[33]** DW1, the solicitor for seventh and eighth defendants, told the court, that the seventh defendant had told her that they had already paid upfront a total of RM2 million in cash before he engaged her to prepare the SPA. Since the purported purchase price was RM4.5 million, this constitutes 44.4% of the purported purchase price.

F **[34]** We find the payment of RM2 million cash before signing of SPA is highly unusual. This is because the normal earnest deposit paid by a buyer is 2% to 3% of the purchase price.

[35] Further, we are of the view that, for the seventh and eighth defendants to pay 44.4% of the purported purchase price, which is a large sum of RM2
G million and also in cash, even before they engaged DW1 to prepare the SPA is highly unusual. What is even more unusual is that, RM2 million in cash is paid even before the purported seller (the third defendant) agreed to the terms of the SPA and signed the SPA signifying that the third defendant is bound by the terms therein.

H **[36]** Given the above, we are of the view that the seventh and eighth defendants had failed to discharge their evidential burden to prove their assertion that the purchase of the subject land was made in good faith.

The Sale Price Was Below Market Price

I **[37]** The seventh and eighth defendants claimed that they purchased subject land purportedly for RM4.5 million. The LHDN valued the market price for the subject land at RM5,269,000. This means the seventh and eighth defendants bought the subject land at a discount of RM769,000.

[38] The seventh defendant testified that he took the risk to pay RM2 million in cash even before signing the SPA and even before searches were done and that if anything went wrong, then he would accept the responsibility. (See: notes of proceeding (NOP) as at pp. 237 to 239). To us, that negates good faith.

Notice Of Assessment

[39] We find that all the bills for assessment rates for the subject land were addressed to the plaintiff's late husband. The seventh and eighth dependants and their solicitors did not check and did not attend to the bills for assessment rates by DBKL. That too, negates good faith.

[40] The seventh and eighth defendants did not provide any documentary proof for the payments of assessment rates and quit rent. Upon perusal of the cause papers and evidence produced before the court, we find that not a single document supports that bare assertion. Quite the opposite, the plaintiff was able to show that DBKL's bills were addressed to her address at Bukit Pantai.

[41] The plaintiff produced receipts to prove that she has been paying the yearly assessment and quit rent. This continued even up to the year 2021 until the fraudulent transfer was discovered.

[42] We are of the view that as land owners, the failure to complete the transfer of names with DBKL and, not paying assessment rates and quit rent are apparent indicators that the seventh and eighth dependants are not *bona fide* purchasers.

Payment Of RM2 Million To Property Agent

[43] The seventh defendant alleged that he paid RM2 million in cash to the third defendant through his estate agent Pathisaran a/l Anthonysamy also known as Steven. The seventh defendant alleged he received a receipt for each of the five payments from the sixth defendant's law firm.

[44] As proof, the seventh defendant referred to five cash/payment vouchers allegedly using cash/payment vouchers of the ninth defendant for convenience, allegedly signed as recipient by Pathisaran a/l Anthonysamy and the five letters from the sixth defendant acknowledging receipt of the five payments.

[45] Having perused the evidence, we find that the testimony of the seventh defendant that the cash of RM2 million came from him is not supported by any documentary evidence.

[46] Further, we find that the seventh defendant's testimony that the cash of RM2 million came from him also contradicted by his wife, the eighth defendant. Under cross-examination, the eighth defendant kept changing her story on the source of this RM2 million, as follows:

A (i) first, she said it is the seventh defendant's money. (See: NOP, as at p. 108 line 18);

(ii) then she said it is a mixture of funds of the seventh and ninth defendants. (See: NOP, as at p. 183 lines 8 to 10); and

B (iii) then she said the RM2 million actually belongs to her and the seventh defendant. (See NOP, as at p. 203 lines 3 to 8).

[47] The five cash/payment vouchers also showed contradictory facts. The payments were stated at line one as "in favour of Pathisaran a/l Anthonysamy". But the payments were stated at line four as "Part deposit C payable for Hasra Hamid & Associates on account of Damansara Property". (See at pp. 198, 200, 202, 204 and 206, record of appeal, encl. 6).

[48] The five letters from the sixth defendant purportedly acknowledging receipt of the five cash payment also showed contradictory facts. They stated the payments as earnest deposit, first, second, third and fourth partial balance D purchase price. (See at pp. 199, 201, 203, 205, and 207), record of appeal, encl. 6)

[49] Given the above, we are of the considered view that the seventh and eighth defendants paid large amounts of cash, leaving no proper trail, the purported payment vouchers are highly irregular. The sixth defendant's E confirmation letters were filled with errors and yet the seventh and eighth defendants were not bothered at all. We find the seventh and eighth defendants are far from genuine purchasers of the land. These are clearly fabricated evidence. These facts are elements which point towards a sham SPA.

F

Adverse Inference

[50] Pathisaran a/l Anthonysamy, the property agent, was not called as a witness. Neither was the sixth defendant. Thus, there are no witnesses who can testify as to the authenticity of the five cash/payment vouchers allegedly G issued by the ninth defendant and the five letters from the sixth defendant purportedly acknowledging receipt of the five cash payments. There was no reasonable explanation for the failure to produce these two material witnesses. The adverse inference would be that if they were to testify, their evidence would affect the seventh and eighth defendants adversely.

H **[51]** In light of the above, this court holds that the seventh defendant has not proven that he had paid RM2 million in cash to his real estate agent Pathisaran a/l Anthonysamy also known as Steven who paid the sixth defendant, the solicitor who then paid her alleged client/the alleged seller (third defendant).

I

Whether The Seventh And Eighth Defendants Provided Valuable Consideration For Their Purchase

[52] Based on the reasons given above, we are of the considered view that the seventh and eighth defendants had failed to prove that they provided valuable consideration of RM4.5 million for the purported purchase of the subject land.

The Plaintiffs Claim Against The Ninth Defendant

[53] The ninth defendant is a company in which the seventh defendant is majority shareholder. (See witness statement of the seventh defendant, question and answer 2), The directors of the ninth defendant are the seventh defendant, eighth defendant and Ms Alice Michael. (See witness statement of the seventh defendant question and answer 3),

[54] We find that the ninth defendant has not shown that it is entitled to lodge a lien-holder's caveat on the subject land as against the plaintiff now that the court has ruled the plaintiff is the rightful owner of the subject land. The plaintiff is, therefore, entitled to an order to remove the ninth defendant's lien-holder's caveat on the subject land.

Malayan Banking Bhd v. Mohd Affandi Ahmad & Anor [2024] 10 CLJ 501; [2024] 6 MLJ 220 [2025] 1 MLRA 429; (Maybank's Case)

[55] In the course of our deliberation, we were alerted by learned counsel for the seventh to ninth defendants of the latest Federal Court's decision of *Maybank*'s case (*supra*) on the law regarding the issue of who is a *bona fide* purchaser for valuable consideration under the proviso to s. 340(3) of the NLC.

[56] For easy reference, the relevant paragraphs in the Federal Court's judgment, are reproduced as follows:

> *[30] Hence, pursuant to s. 340(1) the proprietor whose name has been registered in the register document of title will obtain an indefeasible title to or interest in the land. However, such title or interest so acquired is liable to be set aside under s. 340(2) where it has been obtained by, inter alia, fraud or forgery. In the case of fraud, s. 340(2)(a) provides for the title or interest obtained to be defeasible where the proprietor or his agent is a party or privy to the fraud*. In the case of forgery, s. 340(2)(b) provides for the title or interest so acquired by the proprietor or transferee immediately to the forgery to be defeasible and liable to be set aside. This is so, irrespective of whether the said proprietor or transferee acted in good faith in acquiring the title or interest. This is because there is no similar requirement, as in the case of fraud, that he must also be a party or privy to the forgery. *In these circumstances, where the title or interest is subsequently transferred, s. 340(3)(a) provides that the subsequent proprietor or transferee will similarly obtain a defeasible title or interest. Also, under s. 340(3)(b), any interest subsequently granted out of a title which is defeasible under s. 340(2)(a) and (b) will attract the same consequence. However, where the subsequent*

proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, s. 340(3) proviso confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. This is what we call the concept of deferred indefeasibility. Our present appeal is concerned with the proviso of s. 340(3) of the NLC.

...

[37] It is D3's stand that they are a subsequent purchaser in good faith for valuable consideration. This court in CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 has held that a chargee, having acquired an interest in the land is a purchaser within the meaning of the proviso of s. 340(3) of the NLC. Therefore, D3, a chargee is a subsequent purchaser in the present appeal. Even the Court of Appeal in para. 46 of its judgment acknowledged the fact that the chargee (D3) is a subsequent purchaser. The issue is to what extent is good faith measured on the part of D3, the chargee, which we will address later in this judgment.

...

[41] Question 4 requires this court to determine which of the conflicting decisions prevails, in the case of Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors [2022] 2 CLJ 1; [2022] 1 MLJ 701 and Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526; [2007] 5 MLJ 136 as to measuring the extent of good faith and/or bona fide required of a purchaser within the meaning of s. 340(3) of the NLC.

[47] This court made it clear as to the effect of s. 89 of the NLC in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLJ 553 when it held that the effect of registration is to defeat all prior and subsequent unregistered claims. Richard Malanjum FCJ (as he then was) held that:

> [7] *That the trend favors bona fide subsequent purchasers for value in all jurisdictions applying the Torrens system* has been aptly summarized as follows in Baalman, The Singapore Torrens System at p 86:
>
> > *The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law.*
> >
> > *[8] Basically under the Torrens System the land register is conclusive evidence of the description of the land. A third-party conducting an inquiry of the land need not go beyond the register to ensure that the land he or she is about to purchase is not fraught with encumbrances ...*

Azhar Mohamed FCJ (as he then was) further held in *Pushpaleela* that:

> [146] ... once the scheme of the provisions of s. 89 is seen, it is apparent that since the register document of title is conclusive evidence of ownership and in the present instance, since the register document of title bears the name of the first defendant as the registered proprietor, it follows and becomes conclusive

evidence that the first defendant is the registered proprietor unless defeasible pursuant to s. 340 of the NLC. *What appears on the registered document of title is conclusive as the register is everything under the Torrens System in Gibbs v. Messor & Co [1891] AC 248, Lord Watson said:*

> *The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.*

[147] In the case of *Teh Bee v. K Maruthamuthu* [1977] CLJU 134; [1977] 1 LNS 134; [1977] 2 MLJ 7, it was held that "the fact that the register document of title was in the name of the appellant was conclusive evidence that the title to the land was vested in the appellant." The concept of indefeasibility of title under s. 89 of the NLC applies to the person whose name currently appears as the proprietor on the register of title and not to a former registered proprietor (see Yap Ham Seow).

...

[49] Teh Bee v. K Maruthamuthu [1977] CLJU 134; [1977] 1 LNS 134; [1977] 2 MLJ 7 held the oft-quoted mantra that "Under the Torrens system the register is everything."

[50] Before Bayangan Sepadu, this court had also adopted a similar approach in *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd* [2021] 6 CLJ 650; [2021] 5 MLJ 759, whereby Vernon FCJ in his judgment held that:

> *[37] ... The register document of title is accessible to the public in order to enable the public to conduct land searches at the land registry. The words "indefeasibility of title or interest" in the Torrens system connotes the measure of conclusiveness given to a title or interest in alienated land on registration of the dealing in statutory form*. A title or interest is registered, it cannot be set aside except otherwise statutorily provided under sub-s. 340(2) of the NLC ... The register is everything in the sense that the register document of title is conclusive evidence of entries thereon (see s. 89 of the NLC).
>
> ...
>
> [65]... The NLC is based on the Torrens land administration system which is a system of titles and interests by registration under which the register is conclusive or as some would put it - the register of titles is everything (see s. 89 of the NLC; *Teh Bee v. K Marumuthu* [1977] CLJU 134; [1977] 2 MLJ 7) ... persons need not be concerned to ascertain the validity of the information pertaining to the land as indicated on the register and the circumstances under which such proprietor came to be registered. (emphasis added)

[51] This court in the aforesaid cases upheld the conclusiveness of the register document of title which does not require any person dealing with the land to go behind the register document of title to investigate or to ascertain the validity of the title. It is our judgment that this is the correct position of the law.

...

[58] In other words, *T Sivam and Liputan Simfoni appear to have preferred the broader concept of good faith as laid down in Au Meng Nam, namely to discharge the burden of showing that it is a purchaser in good faith and valuable consideration to seek protection under the proviso of s. 340(3) of the NLC, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances.* Special emphasis on the statement that the question of whether a purchaser has acted as a reasonable prudent purchaser or not would have to be decided on the particular facts of the case (Refer to para. 74 of *Liputan Simfoni*'s judgment).

[59] From the sentiment as expressed, by relying on Au Meng Nam, it would also appear that a subsequent purchaser who is not tainted by the fraud or forgery would not be deemed a bona fide purchaser for good value if he was negligent or careless. This manner of interpretation of the proviso may lead to uncertainty in land dealings and run against the very grain and primary intent of the Torrens system, which is to provide certainty and security of titles and interests once acquired and registered.

...

[64] Given the aforesaid, it is our judgment that Au Meng Nam (which was adopted in T Sivam and Liputan Simfoni) ought not to be taken as authority for the blanket proposition that carelessness or negligence negates good faith under the proviso to s. 340(3) of the NLC. The reason is this. This court should uphold the conclusive nature of the register document of titles and as far as our present appeal is concerned, because of the conclusive nature of the register of titles (whereby D2 is the registered proprietor), there was no legal duty on the chargee, D3 to carry out inspection of the property prior to accepting the charge. The chargee was entitled to rely on the register. Even if the chargee did not carry further enquiries prior to the creation of the charge, at most what can be said of the D3 is that, they have been negligent in not carrying out further enquiries but *negligence perse does not and cannot amount to fraud, as the register of title disclosed that D2 was the registered owner and there was no encumbrance on the land and there was no fraud in the present appeal. Under the Torrens system, the register is everything. By accepting and imposing a blanket proposition that carelessness or negligence negates good faith under the proviso to s. 340(3) of the NLC, would tantamount to undermining the very intent and purpose of the Torrens system, namely to give certainty to the register as reflecting the correct particulars on legally recognised land dealings in land matters.*

...

[65] In addition, s. 340(3) of the NLC would not apply in Au Meng Nam as the case concerned an immediate purchaser. Even if it did, he could not fall within the definition of a bona fide purchaser, as he was a party or privy to the fraud as

interpreted by Lord Lindley in *Assets Company v. Mere Roihi* [1905] AC 176, at p. 210 which had been adopted over and over again by this court where, Lord Lindley articulated that:

> *fraud means actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud. The fraud which must be proved in order to invalidate the title of a registered proprietor for value must be brought home to the person whose registered title is impeached or its agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries, which he omitted to make, does not by itself prove fraud on his part*. But if it were shown that he abstained from making enquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be genuine document which can be properly acted upon.

[66] The rationale as stated by Lord Lindley as aforesaid ought to be the correct approach, so as to align the facts of Au Meng Nam within the definition of fraud under s. 340(2)(a) of the NLC. However, one cannot widen the scope of the duty imposed on the subsequent purchaser to enable to seek the protection under the proviso of s. 340(3), in the manner alluded to, by the Court of Appeal at paras. 46 and 47 in their judgment.

...

[75] There is thus no place for the English equitable doctrine of notice to apply against a subsequent purchaser under s. 340(3) of the NLC in the absence of fraud, deceit or dishonesty, given the conclusiveness of the register document of title as provided in the same, and the clear and deliberate omission of the element of notice (which would otherwise be relevant under the UK deed system) from the proviso to s. 340 of the NLC,

...

[84] The approach taken by the Court of Appeal in this appeal means that a potential purchaser of land will have to trace all previous transactions of the land and to ensure that all the factors affecting these previous transactions are valid and cannot be impugned, despite registered title has been issued. A subsequent purchaser must conduct inquiries and checks on the validity of every single transaction since the registered title was issued to determine the proper provenance of the land.

...

[86] Hence it is our judgment that the Court of Appeal had erred when it held that although D3 has no notice of or knowledge of any impropriety of the plaintiffs' unregistered interest in the lands, D3 should go beyond the register document of title and the sale and purchase transaction to which D3 was not a party, to ascertain the propriety of the sales and purchase agreement between D1 and D2.

...

A *[93] We have alluded in the previous paragraphs in this judgment that, in the absence of any notice of actual fraud, deceit or dishonesty of D3, D3 was not obliged to investigate the underlying sale and purchase transaction between D1 and D2, given that D2 is the registered proprietor on the register of title, and there is no encumbrance on the land,*

B ...

[109] It is our judgment that the Court of Appeal in deciding against D3/appellant, had erred when it contradicted settled principles of land law under the Torrens system, namely a register document of title is conclusive evidence of ownership which defeats all prior unregistered claims thus avoiding the need for one dealing with the land to go behind the registered document of title to investigate and ascertain the
C *validity of the said title.*

[57] Based on the above, the following principles of law can be distilled:

(i) the conclusiveness of the register document of title does not require any person dealing with the land to go behind the register document of title
D to investigate or to ascertain the validity of the title;

(ii) the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 1 MLRA 657; [2007] 5 MLJ 136 *(Au Meng Nam*'s case) (which was adopted in *T Sivam*'s case (*supra*) and *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183 ought not to
E be taken as authority for the blanket proposition that carelessness or negligence negates good faith under the proviso to s. 340(3) of the NLC, Negligence *per se* does not and cannot amount to fraud. By accepting and imposing a blanket proposition that carelessness or negligence negates good faith under the proviso to s. 340(3) of the NLC, would tantamount
F to undermining the very intent and purpose of the Torrens system, namely to give certainty to the register as reflecting the correct particulars on legally recognised land dealings in land matters;

(iii) section 340(3) of the NLC would not apply in *Au Meng Nam*'s case (*supra*) as the case concerned an immediate purchaser. Even if it did, he
G could not fall within the definition of a *bona fide* purchaser, as he was a party or privy to the fraud; and

(iv) in the absence of actual fraud, *deceit* or dishonesty and given the conclusiveness of the register document of title, a subsequent purchaser under s. 340(3) of the NLC would be deemed a purchaser in good faith.
H

[58] Having perused *Maybank*'s case (*supra*) to the facts in our present case, we are of the respectful view that *Maybank*'s case (*supra*) is not applicable to our present case.

[59] We find that the facts in *Maybank*'s case (*supra*) are entirely different.
I The party claiming to be *bona fide* is Maybank, a financial institution which accepted the property as security charged for a term loan. Maybank argued that the charge was valid. However, in the present case, fraud has been

proven and committed brazenly against the plaintiff. The seventh to ninth defendants are attempting to take benefit of the subject land title as opposed to a financial institution, *ie*, Maybank which disbursed a loan and suffered loss.

[60] We find that even though *Au Meng Nam*'s case (*supra*), is distinguished by *Maybank*'s case (*supra*), *T Sivam*'s case (*supra*) is still good law and followed by *Maybank*'s case (*supra*). The seventh to ninth defendants too, failed the good faith requirement as required by *T Sivam*'s case (*supra*).

[61] In our view, the seventh and eighth defendants are two individuals who obtained the transfer of the subject land to themselves but had failed to prove payment of purchase consideration, produced dubious payment vouchers and letters, and with no land search conducted before purchase. These are all findings of fact by the High Court and which we had discussed in paras. 27 to 54 above at length. The above findings of fact are fatal to the seventh to ninth defendants' stance that they are *bona fide* purchasers for valuable consideration.

Conclusion

[62] Based on the aforesaid reasons, we conclude that, despite our finding that the learned JC had erred in finding that the seventh and eighth defendants are immediate purchasers, we find no appealable error or misdirection on the part of the learned JC in his finding that the seventh and eighth defendants are not *bona fide* purchasers for valuable consideration.

[63] As a result, we see no reason to interfere with the final decision of the learned JC. We, therefore, unanimously affirm the decision of the High Court and dismissed the appeal with costs of RM20,000 subject to allocatur.